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No. 06-477

In the Supreme Court of the United States

SERGIO BANDA-ORTIZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-24a) is reported at 445 F.3d 387. The opinion of the Board of Immigration Appeals (Pet. App. 25a-27a) and the decision of the immigration judge (Pet. App. 28a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2006. A petition for rehearing was denied on July 26, 2006 (Pet. App. 6a-7a). The petition for a writ of certiorari was filed on September 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that, as an alternative to

formal removal proceedings and entry of a formal removal order, "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense." 8 U.S.C. 1229c(a)(1) and (b)(1). Voluntary departure may be granted before the initiation of removal proceedings or during the course of such proceedings, 8 U.S.C. 1229c(a)(1), and also may be granted at the close of removal proceedings in lieu of ordering that the alien be removed, 8 U.S.C. 1229c(b)(1). Aliens who receive voluntary departure avoid the five to ten-year period of inadmissibility that would result from an order of removal. See 8 U.S.C. 1182(a)(9)(A). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006) (quoting *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004)). To qualify for a grant of voluntary departure at the close of removal proceedings, an alien must satisfy certain statutory conditions, including establishing that he "has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1)(D); see 8 U.S.C. 1229c(b)(1)(A)-(C).

Because the Act provides that the Attorney General "may" permit an alien to depart voluntarily, the determination whether to allow an alien to do so is discretionary with the Attorney General, and with the immigration judge (IJ) and Board of Immigration Appeals (BIA) who act on his behalf. And the Act further provides that "[t]he Attorney General may by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens." 8 U.S.C. 1229c(e).

The Act prescribes that, when an alien is granted voluntary departure at the close of removal proceedings, "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2).[1] An IJ who grants voluntary departure must "also enter an alternate order [of] removal," which takes effect if the alien fails to depart within the period specified in the voluntary departure order. 8 C.F.R. 1240.26(d); see 8 C.F.R. 1241.1(f). After entry of a final order, authority to extend a period of voluntary departure specified initially by an IJ or the BIA is vested in the district director or other officers of Immigration and Customs Enforcement (ICE) in the Department of Homeland Security, see 8 C.F.R. 1240.26(f), subject to the statutory maximum of 60 days in the case of voluntary departure granted at the conclusion of proceedings. Failure "to depart the United States within the time period specified" results, *inter alia*, in the alien's becoming "ineligible for a period of 10 years," to receive certain forms of discretionary relief, including cancellation of removal, adjustment of status, and a subsequent grant of voluntary departure. 8 U.S.C. 1229c(d)(1)(B) (as amended by Pub. L. No. 109-162, Tit. VIII, § 812, 119 Stat. 3057); see 8 C.F.R. 1240.26(a).

b. The INA provides that an alien who has been found removable from the United States "may file one motion to reopen [the removal] proceedings" to present "new facts." 8 U.S.C. 1229a(c)(6)(A)-(B). The statute prescribes that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative

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[1] When voluntary departure is granted before the initiation or in the course of removal proceedings, rather than at the close of such proceedings, the alien may be allowed a maximum of 120 days to depart voluntarily. 8 U.S.C. 1229c(a)(2)(A).

order of removal." 8 U.S.C. 1229a(c)(6)(C)(i). An alien who is the subject of removal proceedings and who departs the United States may not file a motion to reopen "subsequent to his or her departure." 8 C.F.R. 1003.2(d). In addition, if an alien who is the subject of removal proceedings departs the United States "after the filing of a motion to reopen," the alien's departure "constitute[s] a withdrawal of such motion." *Ibid.*

The regulations provide that, if removal proceedings are reopened, the IJ or the BIA may reinstate voluntary departure, but only "if reopening was granted prior to the expiration of the original period of voluntary departure." 8 C.F.R. 1240.26(f) and (h). Moreover, the "decision to grant or deny a motion to reopen * * * is within the discretion of the Board," and "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a). Finally, the filing of a motion to reopen "shall not stay the execution of any decision made in the case," and "[e]xecution of such decision shall proceed unless a stay of execution is specifically granted by" the BIA or the IJ. 8 C.F.R. 1003.2(f).

2. Petitioner, a native and citizen of Mexico, illegally entered the United States without inspection in 1989. In March 2000, the former Immigration and Naturalization Service charged petitioner with being removable as an alien present in the United States without having been admitted or paroled. Petitioner conceded that he was removable, but sought cancellation of removal under 8 U.S.C. 1229b, or, in the alternative, voluntary departure. Pet. App. 8a.

On February 23, 2001, the IJ denied petitioner's request for cancellation of removal, but granted his request for voluntary departure. App., *infra*, 1a-8a.

The IJ conditioned the grant of voluntary departure on petitioner's posting of a $1500 voluntary departure bond. *Id.* at 7a; see 8 U.S.C. 1229c(b)(3); 8 C.F.R. 1240.26(c)(3). The order specified that, if petitioner posted the bond, he would have a period of 60 days within which to effect voluntary departure. App., *infra*, 7a. As required by governing regulations, the IJ also entered an alternative order of removal that would "become immediately effective" if petitioner failed to depart voluntarily within the prescribed period or failed to post the voluntary departure bond within five days. *Id.* at 8a; see 8 C.F.R. 1240.26(d).

Petitioner filed an administrative appeal to the BIA, which had the effect of rendering the IJ's order non-final and thus of tolling the voluntary departure period pending appeal. See 8 U.S.C. 1101(a)(47)(B) (order becomes "final" upon affirmance by BIA); 8 U.S.C. 1229c(b)(1) (allowing Attorney General to permit voluntary departure at the conclusion of a removal proceeding under 8 U.S.C. 1229a); 8 C.F.R. 1003.6(a), 1003.39; *In re Chouliaris*, 16 I. & N. Dec. 168, 169-170 (BIA 1997). On August 22, 2002, the BIA summarily affirmed the IJ's decision. Pet. App. 33a. The BIA ordered that petitioner be "permitted to voluntarily depart from the United States * * * within 30 days from the date of [the BIA's] order or any extension beyond that time as may be granted by the district director." *Ibid.*; see 8 C.F.R. 1240.26(f). The BIA further ordered that, if petitioner "fail[ed] to so depart," petitioner "shall be removed as provided in the [IJ's] order." Pet. App. 33a. The BIA's order noted that, if petitioner "fail[ed] to depart the United States within the time period specified, or any extensions granted by the district director," petitioner, *inter alia*, "shall be ineligible for a period of 10

years for any further relief" under certain sections of the INA, including the provisions governing cancellation of removal. *Ibid.*

3. Petitioner did not depart the United States within 30 days of the BIA's order. Instead, on September 23, 2002, petitioner filed a motion to reopen his removal proceedings before the BIA, arguing that he had new evidence of hardship to his family in support of his prior request for cancellation of removal. Pet. App. 8a, 29a, 32a.[2] On December 13, 2002, the BIA, noting that the INS had not responded to petitioner's motion to reopen, granted the motion and remanded to the IJ for further proceedings. Pet. App. 32a.

On May 6, 2003, the IJ denied cancellation of removal, concluding that petitioner was ineligible for that relief as a result of his failure to depart the United States within the voluntary departure period. Pet. App. 28a-31a. On November 9, 2004, the BIA affirmed the IJ's decision. *Id.* at 25a-27a. The BIA explained that it had erred in previously granting petitioner's motion to reopen, because, by the time it had granted the motion, petitioner's voluntary departure period had already elapsed, thus rendering him ineligible for cancellation of removal. *Id.* at 26a. The BIA also rejected petitioner's contention that his filing of a motion to reopen had automatically tolled the voluntary departure period. *Ibid.*

4. a. The court of appeals affirmed. Pet. App. 8a-24a. The court observed that "[v]oluntary departure is the result of an agreed-upon exchange of benefits between an alien and the Government," *id.* at 11a, in that

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[2] Although petitioner filed his motion to reopen two days after his voluntary departure period had expired, the INS granted a two-day *nunc pro tunc* extension, thereby rendering his motion filed within the voluntary departure period. See Pet. App. 9a n.2.

it "offer[s] an alien a specific benefit—exemption from the ordinary bars on subsequent relief—in return for a quick departure at no cost to the government," *id.* at 12a (quoting *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004)). The court explained that, "if the alien does not depart promptly, so that the [Government] becomes involved in further and more costly procedures by his attempts to continue his illegal stay here, the original benefit to the [Government] is lost." *Ibid.* (brackets in original) (quoting *Ballenilla-Gonzalez* v. *INS*, 546 F.2d 515, 521 (2d Cir. 1976), cert. denied, 434 U.S. 819 (1977)).

Expressly disagreeing with other courts of appeals, the court of appeals rejected petitioner's contention that the filing of a motion to reopen automatically tolls the voluntary departure period. Pet. App. 11a. The court observed that the Act prescribes a 60-day limitation on the voluntary departure period, see 8 U.S.C. 1229c(b)(2), and explained that "[a]utomatic tolling would effectively extend the validity of [an alien's] voluntary departure period well beyond the sixty days that Congress has authorized." Pet. App. 13a. Although the INA authorizes an alien to file one motion to reopen, 8 U.S.C. 1229a(c)(6), the court concluded that the BIA had reasonably interpreted that provision to "permit the filing and resolution of a motion to reopen" only if "it does not interfere with the agreed upon voluntary departure date or the Government's interest in the finality of an alien's voluntary departure." Pet. App. 14a. An automatic tolling rule, by contrast, would "permit[] an alien to request voluntary departure, exhaust his administrative appeals, move to reopen the removal proceedings, and overstay

the period of voluntary departure, thereby depriving the government of a speedy departure." *Ibid.*[3]

b. The court of appeals denied rehearing en banc, with five judges dissenting. Pet. App. 6a-7a.

5. On November 22, 2006, after the petition for a writ of certiorari was filed, petitioner and the Department of Homeland Security (DHS) jointly filed a motion with the BIA to reopen petitioner's removal proceedings. App., *infra*, 10a. The motion explained that the parties had discovered that petitioner had failed to post a voluntary departure bond as had been required by his voluntary departure order. Under recent BIA precedent, see *In re Diaz-Ruacho*, 24 I. & N. Dec. 47 (2006), petitioner's failure to post the bond meant that he should be treated as having never been permitted to voluntarily depart, such that his failure to depart did not trigger the ten-year ineligibility period for certain forms of relief including cancellation of removal. On December 19, 2006, the BIA granted the joint motion to reopen; vacated its November 9, 2004, decision and the IJ's May 6, 2003, decision; and remanded "the record for further consideration of [petitioner's] application for cancellation of removal." App., *infra*, 10a.

DISCUSSION

Petitioner seeks this Court's review of the question whether the filing of a motion to reopen removal proceedings automatically tolls the running of an alien's voluntary departure period. As petitioner explains (Pet. 7-11), the courts of appeals are divided on the question, with four courts of appeals holding that the filing of a

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[3] Judge Smith dissented, explaining that he would have held that the filing of a motion to reopen before the lapse of the voluntary departure period operates automatically to toll that period. Pet. App. 14a-24a.

motion to reopen automatically tolls the voluntary departure period, see *Kanivets* v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya* v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte* v. *Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe* v. *United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006), and two courts of appeals reaching the contrary conclusion, see *Dekoladenu* v. *Gonzales*, 459 F.3d 500 (4th Cir. 2006); Pet. App. 8a-24a. This case, however, is now moot, and thus does not present a proper vehicle for resolving that conflict.

After the petition for a writ of certiorari was filed, DHS and petitioner jointly moved to reopen petitioner's removal proceedings after the government discovered that petitioner had failed to post a voluntary departure bond. The failure to post the bond had the effect of automatically vacating petitioner's voluntary departure order and giving effect to the alternate order of removal. See 8 C.F.R. 1240.26(c)(3) ("If the bond is not posted within 5 business days, the voluntary departure order shall vacate automatically and the alternate order of removal will take effect on the following day."). The BIA recently held that, because failure to post a bond results in vacatur of the voluntary departure order and in giving effect to the alternate order of removal, an alien who fails to post the bond is not subject to the ten-year ineligibility period for cancellation of removal that would apply if the voluntary departure order had remained in effect and the alien had failed to effect a timely departure. *Diaz-Ruacho*, 24 I. & N. Dec. at 50-51. In this case, accordingly, the BIA reopened petitioner's removal proceedings, vacated its previous decision holding that petitioner was ineligible to seek cancellation of removal (and also vacated the IJ's order reaching that same conclusion), and remanded for further

consideration of petitioner's application for cancellation of removal on the merits. App., *infra*, 10a.

The result of the BIA's granting reopening and vacating the prior administrative decisions is that this case is now moot. The administrative orders that were reviewed by the court of appeals below and that are the subject of the petition for a writ of certiorari are now vacated and are no longer in effect. If those orders had been vacated while the case was in the court of appeals, the court of appeals would have been required to dismiss the petition for judicial review for lack of jurisdiction, because 8 U.S.C. 1252(a)(1) grants the courts of appeals jurisdiction to review only "final" orders of removal. See *Gao* v. *Gonzales*, 464 F.3d 728 (7th Cir. 2006); *Lopez-Ruiz* v. *Ashcroft*, 298 F.3d 886 (9th Cir. 2002). Moreover, because, under the BIA's decision in *Diaz-Ruacho*, petitioner is not subject to ten-year ineligibility period and the BIA accordingly remanded for further consideration of petitioner's application for cancellation of removal, the question whether petitioner's filing of a motion to reopen automatically tolled the voluntary departure period has no continuing significance in this case.

When a case that would otherwise warrant certiorari becomes moot through happenstance or for similar reasons, the appropriate course, in our view, ordinarily is to grant the petition, vacate the court of appeals' judgment, and remand the case with instructions to dismiss. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see also *United States Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 22-25 (1994); U.S. Br. in Opp., *Velsicol Chem. Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900). Here, there is a circuit conflict on the tolling issue. As ex-

plained in our response (at 19-20) to the petition for a writ of certiorari in *Moorani* v. *Gonzales*, No. 06-610, however, the issue does not warrant certiorari at the present time because the Department of Justice plans to address the tolling issue by regulation and there is a prospect of a legislative solution.

Nonetheless, in the unique circumstances of this case and in light of the circuit conflict, vacatur is appropriate here. Vacatur is otherwise proper in the circumstances under *Bonner Mall* because the BIA's decision in *Diaz-Ruacho*, which formed the predicate for the BIA's grant of reopening in this case, was issued on November 15, 2006, after the petition for a writ of certiorari was filed. See generally *Bonner Mall*, 513 U.S. at 23-25 (explaining that vacatur ordinarily is appropriate where mootness is caused by happenstance rather than by voluntary action of party seeking relief from judgment). Moreover, the BIA granted reopening under *Diaz-Ruacho* because petitioner had failed to post the voluntary departure bond within five days of the voluntary departure order, which occurred before the court of appeals' decision in this case, not because of any unilateral action taken by petitioner after the petition for a writ of certiorari was filed.

If this Court elects not to grant the petition, vacate the judgment below, and remand the case with instructions to dismiss, the Court should deny the petition. In all events, there is no warrant for granting review in this case given that the case, and the question raised by the petition, are now moot.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded with instructions to dismiss the petition for judicial review. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2007

APPENDIX A

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
EL PASO, TEXAS

File No: A 29 579 258

IN THE MATTER OF SERGIO BANDA-ORTIZ,
RESPONDENT

Feb. 23, 2001

IN REMOVAL PROCEEDINGS

Charge: Section 212(a)(6)(A)(i) of the immigration and Nationality Act, one present in the United States without being admitted or paroled.

Application: Cancellation of removal under Section 240 (A)(b)(1) of the Act; alternatively, voluntary departure under Section 240(b) of the Act.

ON BEHALF OF RESPONDENT: Michael Pleters, Esquire

ON BEHALF OF SERVICE: Carlos Spector, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 33-year old married male, a native and citizen of Mexico, who testified during the

course of the proceeding that he last entered the United States sometime in 1994 with a local border-crossing card. The Immigration and Naturalization Service issued a Notice to Appear on March 16, 2000, charging that the respondent would be removable from the United States as an inadmissable under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, basing that upon an allegation that he entered the United States at or near El Paso, Texas, sometime in August 1989 without being inspected or paroled by an Immigration officer. The respondent, with counsel, admitted the truth of the four factual allegations on the Notice to appear and conceded removeability under the listed charge. The respondent subsequently testified, however, that his entries were fraudulent, that is, for the purpose of resuming residence in the United States by use of a local boarder-crossing card. However, I note that there is no dispute that the respondent is a native and citizen of Mexico and not a citizen or national of the United States. The respondent therefore has the burden of demonstrating under Section 240(c)(2)(B) of the Immigration and Nationality Act by clear and convincing evidence that he is lawfully present in the United States pursuant to a prior admission. The respondent has not produced any evidence other than his own testimony that he ever possessed a local border-crossing card that allowed him to enter the United States. Without any evidence other than the respondent's own testimony that he entered the United States a local border-crossing card, I find that he has not presented clear and convincing evidence that he is lawfully in the United States pursuant to a prior admission and conclude that since the burden is on him of establishing that, that the charge under Section

212(a)(6)(A)(i) has been sustained based upon both the respondents prior admissions and on the statutory language cited previously and that that has been sustained by clear and convincing evidence. The respondent is therefore removable as charged.

The respondent has applied for the relief of cancellation of removal under Section 240A(b)(1) of the Immigration and Nationality Act and, alternatively, for voluntary departure under Section 240B(b) of the Act. The application for cancellation of removal shall be considered first.

The application was presented on the required form (Exhibit 2) and the required filing fee has been paid. The respondent testifies that he first entered the United States in 1985 after being adopted by his uncle and his aunt by marriage. His uncle is a naturalized citizen of the United States and has been since 1971 (Group Exhibit 3, Section 1, Item 5). The respondent's aunt is a United States citizen by birth (Group Exhibit 3, Section 1, Item 6). The respondent lived with his adoptive parents from approximately 1985, when he entered, to approximately 1989, when he married (Group Exhibit 3, Section 1, Item 1), and has since resided with his wife and their eight-year-old son born to the couple in 1992 and therefore a citizen of the United States by virtue of his birth in this country as well as a citizen of Mexico by virtue of his parent's citizenship. Apparently, no effort was ever made by the respondent's adoptive parents to secure him legal status in the United States, and indeed, considering that the respondent attempted to enter the United States by a false claim to citizenship in 1988, when he went to Mexico for lunch and forgot his entry document and testified further that that entry document

was then brought to him in Mexico by his adoptive father, t[illegible] respondent's adoptive parents apparently knew th[illegible]e was residing in the United States illegally, that is, without proper authorization to do so. The respondent's spouse is a native and citizen of Mexico with no documentation to reside in the United States.

To be eligible for cancellation of removal, the respondent must demonstrate 10 years of continuous physical presence in the United States prior to the date of the application, good moral character for that period, and that his removal would cause exceptional or extremely unusual hardship to a qualifying relative, that is, a spouse, parent, or child who is a citizen or lawful permanent resident. The respondent was served with his Notice to Appear on March 29, 2000, and the 10-year periods would have to have been prior to that date.

In consideration the application for cancellation of removal, I conclude that the respondent has demonstrated that he has been present in the United States for the required 10 years prior to the service of the Notice to Appear. The respondent was adopted in 1985 by people residing in the United States (Exhibit 5) and has shown that he was an attending adult education English classes in this country, married in this country in 1989, and had a child in this country in 1992 by his spouse. I believe that statutory element has been established.

With respect to the statutory element of good moral character, I note that the respondent has testified that he has never had a driver's licence, has never filed federal taxes, has never been part of the Social Security system in the United States as required, and has only on some occasions carried the required liability insurance on vehicles. In addition, the respondent has testified

that he has entered the United States by fraud or misrepresentation on multiple occasions by utilizing a local border-crossing card to travel to and from Mexico for the purpose of residing in the United States. The respondent clearly has not complied with all the various regulatory requirements before residing and driving in the United States, and these requirements are indeed put in place for the purposes of public security and safety in this country. I would note that it is the respondent's burden to demonstrate affirmatively good moral character, in the United States. I also note, however, that no criminal record has been presented (although that clearly is not the touchstone of affirmatively demonstrating good moral character, since the presence of a criminal record would normally disqualify the respondent in terms of the statute, which specifically states that it is not all-inclusive with respect to affirmatively demonstrating good moral character), and I will, for the purpose of this decision, without further inquiry into the issue of good moral character, assume that statutory element has been met.

I find it clear, however, that the respondent has not demonstrated exceptional or extremely unusual hardship to a qualifying relative. The respondent's natural father and siblings still reside in Mexico. His wife is a native and citizen of Mexico, and all of her family resides in Mexico as well. The respondent's adoptive parents are citizens of the United States but have three children of thier own, all born in the United States and residing in this county. I do not believe that there has been any evidence presented that would demonstrate exceptional or extremely unusual hardship to his adoptive parents should the respondent have to reside in Mexico. That leaves the respondent's eight-year-old son, who is cur-

rently in the third grade in a public school in the United States. The child apparently has had some contact with his grandparents and aunts and uncles in Mexico on both sides of the family, the respondent testifying that both he and his wife still maintain contact with their families in Mexico. The respondent himself is employed as a jeweler, a trade he learned in the United States and a trade that he would be able to participate in in Mexico. The respondent's child is able to read, write, and speak the Spanish language as well as English, and, in fact, Japanese, apparently, according to the school records (Group Exhibit 3, Section 3, Items 4 through 12). He is apparently in good health and has resided in a household where the mother apparently speaks primarily the Spanish language. The respondent testified that his son was close to the adoptive grandparents but further testified that he sees them in church once a week, a relationship that does not appear to be exceptional in any way. I note also that the respondent on his application (Exhibit 2, Part 6, Question 46) indicated that his child would not accompany him to Mexico but would apparently, by choice of the respondent and his family, remain in the United States to take advantage of the greater opportunities that are perceived for him by this country. The respondent's counsel had argued that it would be disruptive for the child to leave the United States, move to Mexico, and go to school there. However, I note that the respondent's own testimony is that his education was all in Mexico, that he dropped out of school for the purpose of coming to the United States, that he did not speak or understand the English language at the time he came to the United States but learned that through adult education classes, and yet he has been able to acquire a trade and support his family

in the United States without it evidently being an exceptional or extremely unusual hardship for him personally to do. Indeed, the respondent's testimony is that he was adopted by his aunt and uncle and brought to the United States for the greater opportunities that were perceived to be present in this country and regardless of any possible disruption. Considering all of the evidence and the testimony of record and based upon the factors discussed above and considering all of the hardships alleged to the respondent's son, the qualifying relative about whom evidence has been presented relating to hardship, and considering those hardships both individually and cumulatively, I find that the respondent has not met his burden of demonstrating exceptional or extremely unusual hardship to a qualifying relative for the purpose of cancellation of removal and that application shall therefore be denied.

With respect to the alternative application for voluntary departure from the United States, I note that the respondent has testified that he has entered the United States by fraud or misrepresentation on multiple occasions in the past. I further note that voluntary departure as an alternative has a required departure bond. Considering the respondents prior multiple violations of the immigration laws of the United States by exit and re-entry through the use of a temporary document while at all times intending to reside in the United States, I believe that a bond in the amount of $1,500 would be appropriate. Should that bond be posted on or before close of business Friday, March 2, a period of five business days hence, with the Immigration and Naturalization Service, then voluntary departure shall be extended to Tuesday, April 24, 2001, a period of 60 days. That is the maximum provided by the regulation.

Should the bond not be timely posted or should the respondent not depart when and as required, the privilege of voluntary departure shall be withdrawn on either date without further notice or proceedings and the following order shall thereupon become immediately effective: The respondent shall be removed from the United States to Mexico, the country of his nativity and citizenship and the county designated, on the charge contained in the Notice to Appear.

/s/ GARY BURKHOLDER
GARY BURKHOLDER
Immigration Judge

APPENDIX B

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
FALLS CHURCH, VA 22041

DECISION OF THE BOARD OF
IMMIGRATION APPEALS

File: A29 579 258 - El Paso

IN RE: SERGIO BANDA-ORTIZ

[Filed: Dec. 19, 2006]

IN REMOVAL PROCEEDINGS
MOTION

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Guadalupe R. Gonzales,
Chief Counsel

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[1] The joint motion was signed by counsel for the respondent, but counsel did not include a Notice of Entry of Appearance (Form EOIR-27). Accordingly, the respondent will be treated as pro se and a courtesy copy shall be sent to Michael A. Carvin at the address listed on the motion.

ORDER

PER CURIAM. This case was last before the Board on November 19, 2004, when we affirmed the Immigration Judge's decision, which pretermitted the respondents application for cancellation of removal because the respondent failed to volunt rily depart within the prescribed time. *See* Section 240B(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(d). On November 22, 2006, the respondent and the Department of Homeland Security filed a joint motion to reopen based on *Matter of Diaz-Rancho*, 24 I&N Dec. 47 (BIA 2006). According to the joint motion, the respondent failed to post the requisite voluntary departure bond. Therefore, pursuant to *Matter of Diaz-Rancho*, *supra*, the parties contends that the respondent must be viewed as having never been permitted to voluntarily depart, and accordingly, his motion to reopen should not have been denied based on a failure to voluntarily depart.

The time and number limitations on a motion to reopen do not apply to a motion to reopen agreed upon by all parties and jointly filed. 8 C.F.R. § 1003.2(c)(3)(iii). Since the parties have jointly filed a motion to reopen, we will grant the motion to reopen, vacate our November 9, 2004 decision, as well as the Immigration Judge's May 6, 2003, decision, and remand the record for further consideration of the respondent's application for cancellation of removal.

Accordingly, the joint motion is granted and the record is remanded for further proceedings in accordance with this decision.

[ILLEGIBLE]
FOR THE BOARD